

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:

Big 10 Tire Stores, Inc. operating as
Big 10 Tire Stores #123
730 Academy Drive
Bessemer, Alabama
Jefferson County
Class One Receiver Permit #S0000022284

Order No. 09-XXX-CST

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Big 10 Tire Stores, Inc. pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), and the Alabama Scrap Tire Environmental Quality Act, Ala. Code §§ 22-40A- 1 to 22-40A-24, and the ADEM Administrative Code promulgated thereunder.

FINDINGS OF FACTS

Pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), and the Alabama Scrap Tire Environmental Quality Act, Ala. Code §§ 22-40A- 1 to 22-40A-24, and the ADEM Administrative Code promulgated thereunder, the Department makes the following findings of fact:

1. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

2. Pursuant to Ala. Code § 22-40A-11, the Department is the state agency authorized to administer and enforce the provisions of the Alabama Scrap Tire Environmental Quality Act, Ala. Code §§ 22-40A-1 to 22-40A-24.

3. On November 10, 2004, the Department issued a Class One Receiver registration, No. S0000022284, to Big 10 Tires Stores, Inc. #123 (hereinafter "the Registrant") for a facility located at 730 Academy Drive, Bessemer, in Jefferson County, Alabama.

4. On December 12, 2008, Department personnel conducted an inspection of the Registrant's facility to determine compliance with Division 4 of the ADEM Administrative Code. During the inspection, the following violations were documented:

a. ADEM Admin Code r. 335-4-5-.01(2) states that if a receiver exposes scrap tires to the elements for more than seven days, a Vector Control Plan shall be developed and implemented. At the time of inspection, Department personnel documented that the Registrant had exposed scrap tires to the elements for more than seven days and had failed to develop and implement a Vector Control Plan.

b. ADEM Admin Code r. 335-4-5-.04 requires that the Registrant maintains an operating record at the facility or in an alternate location approved by ADEM, and that the operating record must contain copies of quarterly reports, facility authorization, etc. At the time of inspection, Department personnel documented that the Registrant had failed to maintain copies of quarterly reports and the facility authorization in the operating record.

c. On April 18, 2008 Department personnel conducted an inspection of the Registrant's facility to determine compliance with Division 4 of the ADEM Administrative Code. During the inspection, similar violations were documented.

5. On December 18, 2008, the Department issued a Notice of Violation (hereinafter "NOV") to the Registrant for the violations documented during the December 12, 2008, inspection.

6. The Department did not receive a response to the December 18, 2008, NOV.

7. On March 30, 2009, the Department issued a Failure to Respond letter to the Registrant which requested a response to the December 18, 2008, NOV.

8. The Department did not receive a response to the March 30, 2009, Failure to Respond letter.

CONTENTIONS

Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by the Registrant; the economic benefit which delayed compliance may confer upon the Registrant; the nature, extent and degree of success of the Registrant's efforts to minimize or mitigate the effects of such violation upon the environment; the Registrant's history of previous violations; and the ability of the Registrant to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATION:** The Registrant did not comply with provisions of ADEM Admin. Code div. 335-4. The Department has no evidence of any irreparable harm to the environment. Failure to properly develop and implement a vector control plan may pose a threat to human health and to the safety of the public as a result of the potential presence of disease vectors.

B. **THE STANDARD OF CARE:** The Registrant failed to operate in a manner commensurate with applicable scrap tire regulatory requirements.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Department has been unable to ascertain if the Registrant has realized a

significant economic benefit as a result of the violations noted; however, the Registrant did not incur costs associated with operating in accordance with Division 4 Regulations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is unaware of any efforts employed by the Registrant to mitigate any effects upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Registrant has a history of similar violations.

F. THE ABILITY TO PAY: The Registrant has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty it believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

ORDER

Based on the foregoing findings of facts and pursuant to Ala. Code, §§ 22-22A-5(1), 22-22A-5(10), and 22-22A-5(18), it is hereby ordered:

A. That, not later than forty-five days after issuance of this Order, the Registrant shall pay to the Department a civil penalty in the amount of Four Thousand dollars (\$4,000.00) for the violations cited herein. Said penalty shall be made payable to the Alabama Department of Environmental Management by certified check or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

All checks shall reference the Registrant's name and address and the ADEM Administrative Order number of this action.

B. That, immediately upon the effective date of this Order and each and every day hereafter, the Registrant shall comply with all applicable provisions of ADEM Admin. Code Chap. 335-4.

C. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

D. The parties agree that, subject to the terms of these provisions and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

E. The Registrant agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

F. For purposes of this Consent Order only, the Registrant agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Registrant also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Registrant shall be limited to the defenses of Force Majeure, compliance with this Agreement, and physical impossibility. A Force Majeure is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Registrant, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Registrant) and which delays or prevents performance by a date required by the Consent Order. Events such as

unanticipated or increased costs of performance, changed economic circumstances, or normal precipitation events shall not constitute Force Majeure.

G. The parties agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate; the Registrant shall not object to such future orders, litigation, or enforcement action based on the issuance of this Consent Order if future orders, litigation, or other enforcement action address new matters not raised in this Consent Order.

H. The parties agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Registrant does hereby waive any hearing on the terms and conditions of this Consent Order.

I. The parties agree that this Order shall not affect the Registrant's obligation to comply with any federal, State, or local laws or regulations.

J. The parties agree that final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

K. The parties agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

L. The parties agree that any modifications of this Order must be agreed to in writing signed by both parties.

Executed in duplicate, with each part being an original.

Big Ten Tire Stores, Inc.

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Mike Burgess
(Signature of Authorized Representative)

MIKE BURGESS
(Printed Name)

C.O.O.
(Printed Title)

09-18-09
(Date Signed)

Onis "Trey" Glenn, III
Director

(Date Signed)